

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et
al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Defendants,

and

CROPLIFE AMERICA, et al.,

Intervenor-Defendants.

NO. C01-0132 C

INTERVENOR-DEFENDANTS'
STATEMENT JOINING IN
AND SUPPLEMENTING
FEDERAL DEFENDANTS'
PROPOSED FORM OF
INJUNCTIVE ORDER

INTERVENOR-DEFENDANTS' STATEMENT JOINING IN AND
SUPPLEMENTING FEDERAL DEFENDANTS' PROPOSED FORM
OF INJUNCTIVE ORDER (C01-0132 C)

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1 Pursuant to the parties' agreement, Intervenor-Defendants CropLife America, *et al.*
2 ("Intervenors") submit this statement concerning proposed orders on further injunctive relief.

3 At oral argument on August 14, 2003, the Court directed the parties to confer and try to draft
4 a form of injunction that would address the points identified by the Court at the conclusion of oral
5 argument. *See* Tr. 53-55. Counsel have conferred several times and exchanged drafts and other
6 documents but, despite their best efforts, have been unable to reach an accord on all points.
7 Intervenors hereby join in the Proposed Order on Injunctive Relief and rationale submitted by the
8 Federal Defendants ("EPA Proposal"), as supplemented by Intervenors' Tables E and F, which are
9 attached hereto and referenced in parts III and IV.D.6 of the EPA Proposal.¹ By tendering this
10 response to the Court's request for a proposed form of injunction, Intervenors in no way consent to
11 any injunctive relief ordered by the Court or agree that any of the injunctive relief set forth in the
12 proposed order is supported by law or the factual record. Intervenors' response is without prejudice
13 to, and does not constitute a waiver or compromise of, any claims and defenses they have raised in
14 this case; and Intervenors expressly reserve any and all appeal rights in this case.

15 Intervenors explain below why, with respect to the issues most important to them, the Court
16 should adopt the EPA Proposal as supplemented by Intervenors.

17 **Proposed Buffer Zones.** Intervenors' proposals on buffer zones, appended to the EPA
18 Proposal at Table E, is guided by the Court's comments at oral argument:

19 I would like you to give careful consideration to the suggestions in Mr. Klise's submittal, the
20 Mahini affidavit, regarding specific crop and chemical limitations. Like, for example, the
21 suggestion as to one of the chemicals that it's directly injected into the soil so that isn't as much
of a runoff problem. If it's applied in that manner, the buffer ought to be different or maybe
not even apply at all.

22 I'd like you to give careful consideration to that submittal and try to draft crop specific and
23 chemical specific limitations that will take into consideration the practical realities of farming
and not impose restrictions beyond what is necessary to give the protection to the salmon that
we are trying to accomplish. [Tr. 54-55.]

25 ¹ Table E, described further below, delineates "Injunctive Relief for Specific Pesticides"; and Table F identifies
26 "Additional Uses of Pesticides That Are Categorically Excluded from This Injunction."

1 To get a detailed picture of crop-specific and chemical-specific limitations, CropLife gathered
2 product-specific information from a national database and proposed buffers from member companies
3 that manufacture products containing the pesticide active ingredients at issue in this case, other than
4 those on which EPA has made a “no effect” determination. The results of that extensive inquiry are
5 tabulated in Exhibit 1 to the Second Declaration of Seema A. Mahini, which accompanies this
6 Statement. The columns headed “Proposed interim injunctive relief buffer” and “Reasoning” reflect
7 each product manufacturer’s view, based on the information available to it, of an appropriate interim
8 buffer for its product, and the reasons why that buffer, if any, is appropriate. CropLife then condensed
9 those views into Table E for inclusion in an order.²

10 In Parts III.B and III.C of their Proposed Order Granting Further Injunctive Relief (“Pl.
11 Prop.”), Plaintiffs propose ingredient-specific variations to, and product-specific exclusions from, the
12 default 20-yard (ground) and 100-yard (aerial) proposed buffers. We address them here as space
13 permits. First, as reflected in the EPA Proposal (IV.D.1-5), Table F (¶¶ 7-8), and Pl. Prop. (III.C.11-
14 17), Intervenor and Plaintiffs agree on exemptions for indoor uses, tree injection applications,
15 homeowner applications to household potted plants, flea and tick collars for dogs and cats, pest
16 control strips containing coumaphos, cattle ear tags (coumaphos, chlorpyrifos), and treatments for
17 head lice and scabies (lindane). Further, Intervenor agree with Plaintiffs that pesticide use in bait
18 stations, cut stump tree removal, basal bark applications, and spot treatment of plants and wasp and
19 hornet nests should be excluded, but do not agree that such narrow and confined uses posing no risk
20 of runoff or drift require a 1-yard buffer and other limitations Plaintiffs would impose (*compare* Table
21 F ¶¶ 2-6 *with* Pl. Prop. III.B.10-14).

22 ² Whenever possible, Table E presents proposed buffers at the ingredient-specific level. For the few ingredients for
23 which that level of generality was impossible (e.g., for 2,4-D, chlorpyrifos, and trifluralin), Table E presents distinct
24 buffers for certain groups of products containing the active ingredient. Four active ingredients – dimethoate,
25 linuron, metolachlor, and thiobencarb – are not included in Table E because, as of September 29, 2003, CropLife had
26 not received any information on proposed buffers from manufacturers of products containing those active
ingredients. Intervenor oppose, as unsupported by existing information, the imposition of Plaintiffs’ proposed
buffers on products containing those active ingredients.

Intervenors also agree with Plaintiffs on excluding use of carbofuran products for pine seedlings, but (1) see no justification for Plaintiffs' 1-yard buffer for that use and (2) disagree that the default buffers should apply to other uses (*compare* Table F ¶ 1, Table E, & Mahini 2d Dec. Ex. 1 with Pl. Prop. III.B.9). Similarly, for a use in which the Court expressed interest at oral argument, Intervenors (Table F ¶ 10; Mahini 2d Dec. Ex. 1 (1,3-dichloropropene)) believe all applications by soil fumigation should be excluded – not just to the limited extent and with the unnecessary 1-yard buffer proposed by Plaintiffs (Pl. Prop. III.B.1) – since the product is injected directly into the ground. Analogously, Intervenors (but not Plaintiffs) believe seed treatment and seed coating uses should be excluded, since the product in those instances goes directly into the ground with the seeds (Table F ¶ 10; *e.g.*, Mahini 2d Dec. Ex. 1 (carboxin+diazinon+lindane; lindane)).

Other exemptions proposed by Plaintiffs raise more distinct problems. For molinate and thiobencarb (Pl. Prop. III.B.2-3), Intervenors disagree that buffers are appropriate, inasmuch as buffers are precluded by EPA's "not likely to adversely affect" ("NLAA") determinations for the three referenced ESUs (*see* EPA Proposal pt. II and Table C); Plaintiffs' proposed buffers would be appropriate *only* if the Court decides, contrary to its inclination at oral argument, not to exclude NLAA ingredients from interim relief. For granular formulations, Plaintiffs' proposal (Pl. Prop. III.B.4) is unacceptable because buffers should be ingredient-specific and because granular formulations are a recognized way to mitigate drift. *See* Mahini 2d Dec. Ex. 1 (*e.g.*, diuron, trifluralin). Intervenors oppose Plaintiffs' proposals for phorate, propargite, and fenbutatin-oxide (Pl. Prop. III.B.5-7) because, incredibly, they exceed even the 20-yard and 100-yard buffers that Plaintiffs had sought and deemed adequate until this very late stage of the case, and for other reasons given in Mahini 2d Dec. Ex. 1. Finally, as to Plaintiffs' exclusion of certain other products or uses (Pl. Prop. III.C.1-10), Intervenors agree with the exclusions as far as they go, but disagree that the default buffers should be imposed for other uses of the same ingredients. *See* Table E & Mahini 2d Dec. Ex. 1 (oryzalin, bensulide, phorate, 1,3-dichloropropene).

Urban Pesticides. At oral argument, the Court expressed reluctance to impose the "drastic"

1 sales and use restrictions Plaintiffs had originally proposed. Tr. 23. Intervenor believe that the relief
2 specific to urban use pesticides in part V of the EPA Proposal provides a fair, effective, and workable
3 alternative which educates the general public about the safe and responsible use of pesticide products.
4 In contrast, Plaintiffs' proposal for written and graphic "salmon hazard" warnings on product
5 packaging (Pl. Prop. IV) seems directed at deterring potential purchasers from buying and using
6 pesticide products altogether. Intervenor cannot acquiesce in that remedy, because it would
7 discourage the use of the very products they manufacture without any proof that the products will be
8 hazardous to salmon.

9 Beyond that fundamental philosophical difference, Intervenor object to Plaintiffs' proposal for
10 several other reasons. First and foremost, it runs afoul of FIFRA's complex and rigorous labeling
11 scheme, which is the cornerstone of EPA pesticide regulation. *See* 40 C.F.R. § 156.10. Registered
12 pesticides must have EPA-approved labels. 7 U.S.C. § 136a(c)(1)(C), (c)(5)(B). FIFRA defines
13 "label" and "labeling" broadly to include "the written, printed, or graphic matter on, or attached to, the
14 pesticide or device or any of its containers or wrappers" and "all labels and all other written, printed,
15 or graphic material accompanying the pesticide . . . at any time" or "to which reference is made on the
16 label or in literature accompanying the pesticide." 7 U.S.C. § 136(p)(1), (2). Thus, Plaintiffs'
17 proposal for written and graphic warnings on pesticide packaging would wreak havoc on existing
18 EPA-approved product labels and labeling. A manufacturer cannot alter a label without EPA's
19 approval, which is a time-consuming process. Alteration of an EPA-approved label can result in civil
20 or criminal penalties; so too can distributing or selling a product that is "misbranded" (i.e., "its labeling
21 bears any statement, design, or graphic representation relative thereto or to its ingredients which is
22 false or misleading in any particular"). 7 U.S.C. §§ 136(q), 136j(a)(1)(E), (a)(2)(A), 136l. Plaintiffs'
23 proposal would upend all these principles by requiring manufacturers to alter product label and
24 labeling to add "salmon hazard" warnings. Not only would that end-run the procedures for amending
25 labels, but it would misbrand the pesticides by requiring the inclusion of a hazard warning without any
26 foundation that a hazard exists – a determination that awaits completion of ESA consultation on the

1 pesticides. Manufacturers who attempt to comply with Plaintiffs’ proposal would do so at their peril,
2 under the cloud of FIFRA’s criminal and civil sanctions.

3 Second, Plaintiffs’ new proposal is even more drastic than their original. Plaintiffs would now
4 enjoin *any* sale, distribution, and use of the pesticides in urban areas – not just sales by retailers and
5 use by noncertified applicators – until labels are altered and “unless EPA *ensures* that *all* purchasers
6 and users *receive* with *each* Urban Pesticide” certain written and graphic information. Pl. Prop. IV
7 (emphasis added). Plaintiffs’ proposal is a wolf in sheep’s clothing. Since obtaining EPA’s approvals
8 of label alterations is a time-consuming process, Plaintiffs’ proposal would effectively *ban sales,*
9 *distribution, and use for the entire time* it takes EPA to make ESA effects determinations and
10 complete any needed consultation. Further, Plaintiffs’ ban would be lifted only if EPA meets a
11 standard which is both legally and practically impossible. Under current law, EPA cannot force a seller
12 to condition a sale of a pesticide to a purchaser on the purchaser’s receipt of Plaintiffs’ warnings, much
13 less do so for all sellers, all sales, and all purchasers and, beyond that, assure the same for every
14 product *user*, who may be a complete stranger to the sales transaction.

15 Third, whereas Plaintiffs’ original proposal targeted urban consumers, their new proposal
16 targets urban use *per se*. Intervenors object to this eleventh-hour change. In reliance on Plaintiffs’
17 pervious focus on consumer uses, Intervenors retained at considerable expense an internationally
18 prominent firm with expertise in consumer education programs to develop a proposal that focused on
19 *consumer* uses and education in the Pacific Northwest. Intervenors believe, as we had thought
20 Plaintiffs did, that professional dealers and applicators already have the training and information
21 necessary to address the Court’s concerns, and that education efforts should focus on consumers, as
22 done by the consumer-education responsibilities Intervenors would assume under part V.B. of EPA’s
23 Proposal. Given Intervenors’ reasonable and good-faith reliance on Plaintiffs’ original theory, Plaintiffs
24 should not be allowed to change it now.

25 For the above reasons, the Court should adopt the form of injunctive relief presented by the
26 Federal Defendants as supplemented by Intervenors in Tables E and F.

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2 DATED this 2nd day of October, 2003.

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Table E

INJUNCTIVE RELIEF FOR SPECIFIC PESTICIDES

Active Ingredient	Product	Interim Injunctive Relief Buffer
1,3-DICHLOROPROPENE	All	0 yards
2,4-D	2,4-D Amine-4 2,4-D LV 4 2,4-D LV 6 2,4-D Amine Barrage® HF Opti-Amine® Weed Rhap A-4D Weed Rhap LV-6D Orchard Clean™ 4L Turret® Weedar® 64 Weedone® 638 Weedone® LV4 EC Weedone® LV4 Solventless Weedone® LV6 EC Weedar® 64 Herbicide AM-40 Amine Salt Dri-Clean® Herbicide Solution Water Soluble Amine 4 2,4-D Low Vol 4 Ester Weed Killer Low Vol 6 Ester Weed Killer Saber® Saber® CA Salvo® Savage® CA Savage® Dry Soluble Millenium® Ultra Campaign® RT Master™ Dissolve® Triplet® SF Landmaster® BW Connect™ 20 WSP Credit Master™ Turflon® D Weedmaster® Herbicide KambaMaster™ Pasturemaster™	For agricultural and non-agricultural spray applications, except spot treatments and aquatic applications -- 10 feet by ground and 25 feet by aerial application Granular applications, except aquatic applications -- 1 yard Aquatic applications, liquid or granular -- N/A Spot Treatments -- N/A Trees Injection -- N/A
2,4-D	Starane®+Saber® Starane®+Salvo® Herbicide (Starane + Esteron) Grazon® P+D Tordon® 101 Mixture Crossbow® Herbicide Crossbow® SF Cimmaron™ Max Part B	Ground: 10 foot buffer upwind of salmon waters Aerial: 25 foot buffer upwind of salmon waters
2,4-D	Pathway® Tordon® RTU	0 yards
ACEPHATE	All	0 yards
AZINPHOS-METHYL	All	Potatoes: 25 feet (ground), 150 feet (aerial) Other crops: 25 feet (ground, chemigation, orchard, airblast), 50 feet (aerial)

Table E

INJUNCTIVE RELIEF FOR SPECIFIC PESTICIDES

Active Ingredient	Product	Interim Injunctive Relief Buffer
BENSULIDE	All	0 yards buffer for ground application 6 lbs. or less Active ingredient incorporated in bands Over 6 lbs. Incorporated in bands range from 10 to maximum of 20 yards depending on application technology used
BROMOXYNIL	All except Buctril® + Atrazine Herbicide	0 yards
BROMOXYNIL	Buctril® + Atrazine Herbicide	As prescribed in current label
CAPTAN	All	Ground (including airblast): 1 yard Aerial: 40 yards upwind of salmon waters
CARBARYL	All	0 yards
CARBOFURAN	All	Ground: 10 feet Aerial: 20 feet
CHLOROTHALONIL	All	Ground: 25 feet Aerial: 150 feet
CHLORPYRIFOS	Chlorpyrifos 4E Nufos® 15G Lorsban® 75 WG Lorsban®-4E Lock-On® Lorsban® 50-W in Water Soluble Packets Lorsban® 50-W	Ground (including ground boom): 25 feet Chemigation: 25 feet Orchard Airblast: 50 feet Aerial: 150 feet
CHLORPYRIFOS	Dursban® Pro Dursban® 1G Dursban® 2.5G Dursban® 2E Dursban® 4E Dursban® 4E-N Dursban® 50W in Water Soluble Packets Lorsban® 15G	Ground: 25 feet with vegetative cover, except no buffer for hand can, hand gun, and backpack single wand sprays
CHLORPYRIFOS	Dursban® ME02 Dursban® ME04 Dursban® ME20 Lorsban® 4E-SG	0 yards
CHLORPYRIFOS	Nufos® 4E (RUP)	As prescribed in current label
COUMAPHOS	All	0 yards
DIAZINON	All	Buffers already submitted for salmonid protection to California Department of Pesticide Registration and other agencies. These are part of a suite of best management practices and include for orchard uses a ban on use where wind is moving in the direction of sensitive aquatic sites, a ten foot vegetative buffer, a ban on aerial application when the wind speed exceeds 10 mph, and for use on irrigated crops a 100 foot upslope buffer.
DIFLUBENZURON	All	Ground: 25 feet Aerial: 150 feet
DISULFOTON	All	Ground and aerial: 25 feet
DIURON	All	Ground: 25 feet Aerial: 100 feet
ETHOPROP	All	As prescribed in current labels
FENAMIPHOS	All	As prescribed in current labels
FENBUTATIN-OXIDE	All	Ground: 25 feet Aerial: 125 feet
IPRODIONE	All	As prescribed in current labels
LINDANE	Lindane	0 yards

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Active Ingredient	Product	Interim Injunctive Relief Buffer
MALATHION	All	0 yards
METHAMIDOPHOS	All	0 yards
METHIDATHION	All	Ground: 8.3-16.7 yards Aerial: 50 yards
METHOMYL	All	Ground: 25 feet Aerial: 100 feet Ultra-low volume: 150 yards
METHYL PARATHION	All	0 yards
METRIBUZIN	All	0 yards
MOLINATE	All	For use on rice in ESUs of Sacramento River winter-run chinook salmon, California Central Valley Spring-run chinook salmon, and California Central Valley steelhead: 25 feet (ground), 150 feet (aerial)
NALED	All	Mosquito control: 0 yards Ground application to field and vegetable crops: 25 feet Aerial application to field and vegetable crops: 150 feet Air-assisted application to almonds or peaches (dormant): 100 feet Air-assisted application to grapes, citrus, or almonds where wind is blowing or gusting toward water body: 50 feet
ORYZALIN	All	Ground: 25 feet Aerial: N/A
OXYFLUORFEN	All	Ground and aerial: 25 feet
PENDIMETHALIN	All	0 yards
PHORATE	All	Ground: 66 feet for highly erodible land adjacent to aquatic bodies Aerial: N/A
PHOSMET	All	As prescribed in current label
PROMETRYN	Prometryn 4L	Ground application: 25 feet upwind of salmon-containing water bodies, and allow at least 24 hours between application and any irrigation that results in surface runoff into salmon-containing waters. Such irrigation does not include chemigation, where only enough water to effectively broadcast product is delivered. Aerial application: 100 feet upwind of salmon-containing water bodies, and allow at least 24 hours between application and any irrigation that results in surface run-off into salmon-containing water bodies. Do not make aerial applications while irrigation water is on the field unless surface runoff is contained for 72 hours following application.
PROPARGITE	All	Ground: 50 feet Aerial: 75 feet
TEBUTHIURON	Spike® 20P Spike® 40P	3 feet
TEBUTHIURON	Spike® 80DF	Ground: 10 feet when applied upwind of a salmon stream Aerial: 25 feet when applied upwind of a salmon stream
TRICLOPYR BEE	Garlon® 4	0 yards

Table E

INJUNCTIVE RELIEF FOR SPECIFIC PESTICIDES

Active Ingredient	Product	Interim Injunctive Relief Buffer
TRIFLURALIN	Team® 2G Turf Fertilizer Contains Team® 0.92% Turf Fertilizer Contains Team® 1.15% Turf Fertilizer Contains Team® 1.25% Turf Fertilizer Contains Team® {X.XX(a)}% Turf Fertilizer Contains Gallery® + Team® Treflan® 5G Treflan® TR-10 Snapshot® 2.5 TG	Ground and aerial: 3 feet
TRIFLURALIN	Broadstrike® + Treflan® Treflan® EC Weed & Grass Preventor	Ground: 10 foot buffer upwind of salmon stream
TRIFLURALIN	Trust® 4 EC Trust® Herbicide Trifluralin 10G Trillin® 10G Trillin® 5 Trillin® Herbicide Trifluralin 4 EC Buckle® Triflurex HFP	Granules: Drift: 10 feet for ground application when air moving toward water; 25 feet for aerial application when air moving toward water. Runoff: 20 feet. EC formulations: Drift: 25 feet for ground application when air is moving toward water. Runoff: 20 feet.
TRIFLURALIN	Tenkoz® Trifluralin® 4 EC Triap® 4HF Treflan® HFP	Ground: 10 foot buffer upwind of a salmon stream. Aerial: N/A -- not applied aerially in affected ESUs

TABLE F

ADDITIONAL USES OF PESTICIDES THAT ARE CATEGORICALLY EXCLUDED FROM THIS INJUNCTION

In addition to the uses set forth in section IV.D.1.-5. of the Proposed Order on Interim Relief submitted by the Federal Defendants, Intervenor-Defendants propose the following additional use of pesticides that are categorically excluded from this injunction:

1. Use of carbofuran products when such products are applied to pine seedlings by dipping the seedling roots in a one-percent slurry containing the active ingredient.
2. Uses of pesticides in insect bait stations.
3. Spot treatment of wasp and hornet nests.
4. Localized spot treatments of plants using 2,4-D products by means of backpack, hand-can, hand-held spray guns, or other ready-to-use devices.
5. Basal bark applications to individual plants.
6. Cut-stump applications during individual tree harvesting, in which an herbicide is applied directly to the surface of a freshly cut stump to suppress re-sprouting and/or suckering.
7. Use of cattle ear tags containing chlorpyrifos.
8. Use of lindane products for head lice and scabies.
9. Use of pesticides as seed treatments and seed coatings.
10. Application of pesticides by means of soil fumigation.